Editor's note: Reconsideration granted; decision vacated -- See Nora L. Sanford (On Reconsideration), 63 IBLA 335 (April 28, 1982)

NORA L. SANFORD

IBLA 78-68 Decided September 19, 1979

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting part of Native allotment application F-12554.

Affirmed.

1. Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Generally -- Applications and Entries: Filing -- Equitable Adjudication: Generally

   The Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976) repealed the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 to 270-3 (1970) with the exception of applications pending on Dec. 18, 1971. A State Office decision rejecting a Native allotment application for an additional parcel of land filed pursuant to the Act of May 17, 1906, after Dec. 18, 1971, will be affirmed. Equitable adjudication, which requires substantial compliance with the law, will not be invoked where there is no evidence that such an application was timely filed with BIA.

APPEARANCES: James Q. Mery, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Nora L. Sanford appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated October 18, 1977, denying part of her Native allotment application F-12554 known as Parcel C

filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18(a), Alaska Native Claims Settlement Act (ANCSA, 43 U.S.C. § 1617 (1976)), because appellant had failed to file timely a proper and complete application.

The Bureau of Indian Affairs (BIA), on appellant's behalf, initially filed an application for two parcels of land (A and B) on February 3, 1970. On November 17, 1972, BIA sent a memorandum to BLM adding Parcel C to the claim. The memorandum reads as follows:

> The enclosed Native Allotment parcels should have been included in the original application, through our error I wish to include the following parcels for Nora L. Sanford, Edward Mayo, Jr., Sarah Joe, and Erick Carlson.
>
> There will be more corrected descriptions and added parcels sent to your office. During the processing of the Native Allotment applications, we had overlooked a lot of the applications which were incorrect or incomplete. This was due to, or [sic] course, the mass production of applicants applying within a short given amount time before the ANCSA appealed (sic) the Native Allotment Act.

Attached to the memorandum was a land description for Parcel C:

> Parcel C:
>
> Beginning at a point on the north bank of Dry Tok Creek at approximate Latitude 63 degrees 06' 42" N, Longitude 143 degrees 55' 18" W, thence northwest 20 chains to corner 2, thence northeast 20 chains to corner 3 and west bank of an unnamed slough, thence southerly along the west bank of the unnamed slough 20 chains to corner 4 and junction of the unnamed slough and Dry Tok Creek, thence westerly along the north bank of Dry Tok Creek 20 chains to the point of beginning. Contains 40 acres. Located in Section 33; T. 16 N. and Section 4 and 5, T. 15 N, R. 8 E; C. R. M. Tanacross A-6.

In its decision the State Office gave the following as grounds for denying the application for Parcel C:

> Departmental regulation 43 CFR 2561.1(a) states that:
>
> Applications for allotment properly and completely executed on a form approved by the Director, Bureau of Land Management, must be filed in the proper office which has jurisdiction over the lands. (Emphasis added.)

> A memorandum from the Bureau of Indian Affairs is not a proper and complete application on an approved form. Further-more, there is no signature by the applicant. The proper and complete application also had to have been filed with the Bureau of Indian Affairs by December 18, 1971. The memorandum was not filed with the Bureau of Land Management until November 20, 1972.
>
> Therefore, since there is no proper application on file for Parcel C, that parcel is hereby rejected and the parcel will be closed and removed from the records when this decision becomes final.

In her statement of reasons, appellant offered the following enumeration of facts:

> On January 21, 1970, the Appellant signed her application for her Alaska Native Allotment of 160 acres of land. The Applicant submitted a signed and dated blank application so that the Bureau of Indian Affairs (BIA) could type in the information that she provided to the BIA realty officer.
>
> On February 3, 1970, the BIA filed the Appellant's allotment application with the BLM. The application as submitted contained only two tracts of land amounting to 80 acres. No reference was made on this application to Appellant's Parcel C.

Appellant presents four arguments on appeal:

I. Appellant's Parcel C was timely filed with the Bureau of Indian Affairs and must be accepted for filing by the Bureau of Land Management.

II. Appellant's Parcel C should be accepted in accord with the principles of equitable adjudication.

III. The United States has trust duties to appellant.

IV. Appellant is entitled to a hearing on issues of fact involved in her appeal.

Under the first point, appellant contends that all applications on file with BIA prior to December 18, 1971, must be accepted for filing and processed by BLM. To support this contention she cites section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976) which provides in pertinent part:

> Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing

> provisions of this section, any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may at the option of the Native applicant be approved and a patent issued in accordance with said . . . 906 Act . . . . 43 U.S.C. § 1617(a).

Appellant notes that the phrase "pending before the Department on December 18, 1971" was interpreted in a memorandum dated October 18, 1973, from the Assistant Secretary, Jack O. Horton, to the Director, BLM. The memorandum reads as follows:

> Pending Before The Department on December 18, 1971.
>
> This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971.

Since BIA is a bureau of the Department of the Interior, appellant concludes that her application was pending before the Department and must be accepted by BLM for filing.

Appellant contends that BIA's memorandum of November 17, 1972, supports the proposition that her application for Parcel C was on file with the BIA prior to December 18, 1971. The memorandum stated ". . . the enclosed Native Allotment parcels should have been included in the original applications . . . ." Appellant notes that an application for Parcels A and B was submitted to BLM on February 3, 1970, and contends that application for Parcel C should have been submitted at the same time.

For her second point, appellant contends that the Board should apply the principles of equity by invoking 43 CFR 1871.1-1, the regulation dealing with equitable adjudication, and allow appellant to file her application for Parcel C. Appellant argues that her case comes within the scope of this regulation because she has substantially complied with the requirements of the Native Allotment Act, supra, and because the delay in filing was not her fault.

Under the third point, appellant discusses the fiduciary relationship existing between the United States and the Indians. Applying the principles of trust law to this case, appellant contends that no error can be imputed to her because BIA, upon receiving appellant's application, had the duty to file it timely with BLM. She concludes that BIA has failed to carry out its duty and has subjected the United States to liability for failure to protect and preserve the trust property of its Native beneficiaries.

Finally, if the evidence which appellant submitted to BIA is found to be insufficient for the acceptance of her application, appellant requests a hearing under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) on the disputed issues of fact involved in this appeal.

[1] BLM properly rejected appellant's "application" for Parcel C. The Alaska Native Claims Settlement Act, supra, repealed the Act of May 17, 1906, supra, with the exception of applications pending on December 18, 1971. Appellant's "application" for Parcel C was filed with BLM on November 17, 1972. No evidence has been submitted to show that there was an application on file with BIA on or before December 18, 1971; BIA's memorandum of November 17, 1972, offers no proof that such an application existed.

Appellant's attempt to save her "application" for Parcel C by labeling it as an amendment to her original application for Parcels A and B which was filed prior to December 18, 1971, is to no avail. The Board has permitted amendments of land descriptions subsequent to the repeal of the Act of May 17, 1906, supra, only in those situations in which the amendment was necessitated by the inability to properly identify the site of the land on a protraction diagram. See Raymond Paneak, 19 IBLA 68 (1975). Appellant's amendment was not intended to correct an improper identification of the land in the original application, but rather to request additional lands not described in the original application. Appellant's amendment is, in effect, a new application. An amendment filed after December 18, 1971, which embraces new or other lands not described in an application pending on that date must be rejected. Raymond Paneak, supra; George Ondola, 17 IBLA 363 (1974).

Nor do we find that appellant's case warrants the application of equitable adjudication. 43 CFR 1871.1-1, the regulation governing equitable adjudication, requires that there be substantial compliance with the law in order for equitable adjudication to be invoked. The regulations issued pursuant to the Act of May 17, 1906, supra, set forth the requirements for an application. The applicable regulation, 43 CFR 2561.1(a), requires that applications for allotment properly and completely executed on a form approved by the Director, BLM, must be filed in the proper office which has jurisdiction over the lands. There is no substantial compliance with the law if a substantially complete application has not been filed. Appellant relies on Julius F. Pleasant, 5 IBLA 171 (1972) to support her contention that she is eligible for equitable adjudication. That case, however, can be distinguished from the one in issue. In Pleasant, supra, the Natives delivered their application to BIA within the time required, but BIA held them past the time when they were required to be filed with BLM. In appellant's case, no application was ever filed.

Appellant contends that she is entitled to a hearing under Pence v. Kleppe, supra, prior to the rejection of her "application." A hearing in this case would serve no useful purpose. Regardless of any evidence appellant may offer, the fact remains that the application was not timely filed as required by the law and regulations. Procedurally, appellant therefore may not have her "application" processed. We do not find that the due process protections enumerated in Pence, which include a hearing, apply to cases in which the initial procedural requirements of the regulations have not been met.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I find myself in agreement with the majority's disposition of the instant appeal, I wish to address two points which are not discussed in the decision.

While this appeal involves a parcel denominated as "C" it is useful to note that 2-1/2 years after the discovery that parcel C had been "overlooked" officials of BIA discovered that a parcel "D" had similarly been "overlooked." This subsequent discovery provides proof positive that no document existed in BIA which disclosed appellant's intent to apply for parcel C, since such a document would have, perforce of logic, also covered parcel D. Thus, there was simply no application of record pending before BIA as of the critical date. Nor does BIA even contend that such a document existed. The purported amendment must be treated as a new application.

My second point relates to the allegation that the appellant signed the allotment application in blank. While it was certainly proper for BIA to assist in the completion of Native allotment applications, the fact remains that the application is that of the Native. Appellant declares in her statement of reasons for appeal that "[t]he applicant submitted a signed and dated blank application so that the Bureau of Indian Affairs (BIA) could type in the information that she provided to the BIA realty officer." Statement of Reasons at 2. If this is, in fact, the case, it is my view that the entire allotment application should, as a matter of law, be rejected.

The Native allotment application form requires the allotment applicant to attest to the following statement: "I CERTIFY That the statements made herein are true, complete, and correct to the best of my knowledge and belief and are made in good faith." It seems to me demonstrably impossible for an applicant to certify statements which have not appeared at the time in which the application is signed. This is particularly true where, as here, the certification is made under the provisions of 18 U.S.C. § 1001 (1976) which provides criminal penalties for false or misleading statements made to the Government.

While this Board has permitted amendment of land descriptions subsequent to the repeal of the Native Allotment Act, such action has been expressly limited to those situations in which the amendment was necessitated by the inability to properly identify the site of the land on a protraction diagram. See Raymond Paneak, 19 IBLA 68 (1975).

Moreover, this Board has expressly rejected attempts to amend Native allotment applications to embrace additional land subsequent to December 18, 1971. George Ondola, 17 IBLA 363 (1974). The only tangible difference between this case and Ondola is that BIA states herein that the error was BIA's.

What is totally unexplained, however, is that the mistake continued for over 2-1/2 years before any attempt, either by BIA or the applicant, to correct it. Moreover, we are not faced with a Departmental policy or regulation which interdicts acceptance of new applications. Rather, Congress has expressly repealed the Act subject only to applications then pending. Attempts to acquire additional land can only be considered to be new applications and as such are barred by the appeal.

For these additional reasons, I agree that the decision of the Alaska State Office, Bureau of Land Management, rejecting Parcel C of Native allotment application F-12554, must be affirmed.

James L. Burski
Administrative Judge